IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

VICTOR AGUIRRE, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. 1:14-CV-67**
	§	
	§	
ISC CONSTRUCTORS, LLC,	§	
	§	
Defendant.	§	

ORDER ON DISCOVERY MOTIONS

In accordance with 28 U.S.C. § 636(c) and the Local Rules for the United States District Court for the Eastern District of Texas, this matter is before the undersigned United States Magistrate Judge for all matters, including trial and entry of judgment. *See Order* (doc. #22). Pending before this Court for purposes of this order are the plaintiffs' *Motion for Protection from Discovery* (doc. #36) and the defendant's *Motion & Incorporated Memorandum to Compel Plaintiffs' Discovery Responses* (doc. #44).

I. Background

The parties are well-aware of the convoluted procedural history of this particular case, and the Court has entered several orders or reports summarizing the background. In the interest of brevity, in this order the Court need only note that there are approximately 43 active plaintiffs in this case asserting causes of action against defendant ISC Constructors, LLC ("ISC"), based on claims arising under the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act. Plaintiffs generally allege that their employer, ISC, failed to properly pay wages due for work performed on the Crude Expansion Project (CEP) at the Motiva Refinery in Port Arthur, Texas. The undersigned recently entered an amended scheduling order which reset trial before this Court on December 5, 2016, and extended the discovery deadline to October 3, 2016. *See First Amended Scheduling Order* (doc. #57).

Currently at issue in the motions before the Court are a number of discovery disputes. Defendant contends that the plaintiffs' responses to its written discovery responses have been wholly deficient or nonresponsive. More specifically, ISC argues that the plaintiffs' have asserted boilerplate and nonspecific objections to its Requests for Admission, Requests for Production and Interrogatories or that plaintiffs have failed to respond to some requests at all. *See ISC's Motion to Compel* (doc. # 44), at pp. 2-9. ISC also contends that it agreed to several extensions requested by the plaintiffs to either provide or supplement their discovery responses but, to date, plaintiffs have failed to do so. *See id.* at pp. 2-5. Plaintiffs responded by generally arguing that they should only be required to give "representative discovery"limiting discovery and trial to a bellwether test group of 10 plaintiffs. *See Plaintiffs' Response to ISC's Motion to Compel* (doc. #46), at p. 1. Plaintiffs also contend that ISC is already aware of information contained in its discovery requests and that it possesses information sought it in its requests. *Id.* at p. 2. They further state that they have supplemented their discovery responses. *Id.* Plaintiffs relatedly argue that they "should not be required to suffer the undue burden and costs of responding to discovery" when defendant has not shown that the benefits of that discovery outweigh the burdens and costs to be incurred by plaintiffs.

Id. at p. 3. ISC replied, generally arguing that the plaintiffs should be required to comply with their discovery obligations. *See ISC's Reply Memorandum* (doc. #47). It also contends that the plaintiffs should not be excused from responding to discovery simply because they have filed a separate motion for protection (discussed below) or based on Chief United States District Judge Ron Clark's decision to limit trial in another case to a bellwether group of plaintiffs. *Id.* at pp. 2-3.

In their related *Motion for Protection from Discovery* (doc. #36), the plaintiffs contend that discovery should be limited to a group of 10 plaintiffs given the common set of facts for all plaintiffs and defendant's alleged knowledge of the procedures and work requirements at issue. Plaintiffs contend that discovery from all named plaintiffs is unnecessary to determine whether ISC violated the FLSA. *See Motion*, at pp. 6-7. For many of the same reasons asserted in its *Reply* addressed *supra*, ISC opposed the motion for protection by contending that representative discovery is improper and unnecessary in a FLSA case such as this which is not a collective action. *See ISC"s Response to Motion for Protection* (doc. #37). ISC reiterates its arguments regarding plaintiffs' alleged failure to comply with its discovery requests. It also argues that there is no supporting legal authority from other FLSA cases supporting the use of representative discovery in this matter. More specifically, ISC discusses case law on the issue and contends that individualized discovery is necessary under the circumstances of this proceeding. *See Response*, at pp. 11-15.

II. Discussion

A. Plaintiffs' Request for Representative Discovery and Protection from Discovery

Federal Rule of Civil Procedure 26(b)(1) allows discovery of any "non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *See* FED. R. CIV. P. 26(b)(1). Rule 26(b) allows great freedom in discovery, while the Federal Rules of Evidence control what is admissible at trial. *See In re Depuy Orthopaedics*, No. 3:11-MD-2244-K, 2014 WL 3557392, 2014 U.S. Dist. LEXIS 97468, at *11 (N.D. Tex. July 18, 2014); FED. R. CIV. P. 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable. ") Rule 26(c) relatedly provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ." FED. R. CIV. P. 26(c).

Certainly, a defendant has every right to obtain discovery from the plaintiffs who have filed allegations against it. *See, e.g., Moore v. City of Columbus*, No. 12-CV-50-DAS, 2013 U.S. Dist. LEXIS 64959, at *11 (N.D. Miss. May 7, 2013) (related to depositions). Given the broad parameters of the Rules governing discovery, the plaintiffs have not presented persuasive and applicable legal authority establishing how or why they should be relieved from discovery or deposition by ISC[1]. ISC should not be forced to defend against summary judgment or subjected to trial without having had the opportunity to conduct the discovery it seeks which is allowed by the rules. *See Moore,* at *11. Denying defendant the opportunity to obtain discovery from and depose each party plaintiff who has asserted an individualized claim would certainly prejudice ISC. *See id.* The plaintiffs have not pled

[1]The testimony of any person may be taken by deposition. 7 JAMES WM. MOORE *et al.*, MOORE'S FEDERAL PRACTICE § 30.03[1] (Matthew Bender 3d ed. 2015) (citing Fed. R. Civ. P. 30(a)(1)). The right to depose a witness and the right to use that testimony are separate and distinct. *See In re Depuy Orthopaedics,* at *12 (citing *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88, 93 (N.D. Tex. 1994)). Federal Rule of Civil Procedure 30 provides that a party may depose any person, including a party, without leave of court. *See* FED R. CIV. P. 30(a)(1) (subject to certain limitations discussed in Rule 30(a)(2)).

a FLSA collective action claim under 29 U.S.C. § 216(b) nor have they moved for conditional certification. *See, e.g., Johnson v. TGF Haircutters, Inc.*, 319 F. Supp. 2d 753, 754 (S.D. Tex. 2004) ("Section 16(b) of the FLSA permits an employee to bring an action against her employer '[on] behalf of herself … and other employees similarly situated'" (quoting 29 U.S.C. § 216(b)). Rather, they sue on behalf of themselves individually under the FLSA. *See Amended Complaint* (doc. #30). Even if the plaintiffs in this case could be considered "opt-in" party plaintiffs under 28 U.S.C. § 216(b), they are still eligible for any discovery process available and are obligated to respond to all discovery requests. *See* Iliza Bershad, *Employing Arbitration: FLSA Collective Actions Post-Concepcion*, 34 CARDOZO L. REV. 359, 388 n.146 (2012); *see also Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1244 (11th Cir. 2008) (issuing a discovery management order in a collective FLSA case which limited defendant to 250 depositions of opt-in plaintiffs and imposing no restrictions on depositions by written question; also dismissed with prejudice opt-in plaintiffs who failed to appear at their depositions).

The Court accordingly overrules plaintiffs' arguments against requiring discovery responses from every party plaintiff. The right to obtain discovery from every named plaintiff is clearly permitted under the scope of discovery. The plaintiffs contend that discovery from all plaintiffs is unnecessary to determine whether ISC violated the FLSA. However, applying Rule 26, there has been no showing that discovery from the named plaintiffs themselves - parties to the case who opted to bring suit against ISC as their employer - is not relevant to any party's claim or defense in this case or proportional to the needs of the case. Plaintiffs' general argument that discovery beyond a limited test group is unnecessary and irrelevant is outweighed by ISC's need to obtain discovery and testimony from each plaintiff who has asserted an individual claim. There is no disputing that the factual circumstances for each individual plaintiff will be varied as to the hours allegedly worked and pre-shift compensable time allegedly expended. ISC has also asserted limitations defenses which may apply to some plaintiffs but not others, as further explained in its briefs. Under Rule 26(b), the benefit of the discovery and its importance in resolving the issues weigh in favor of permitting ISC to obtain the requested discovery.

The Court acknowledges that a test group or bellwether *trial* may be appropriate in some cases under the FLSA. *See Order in Morua, et al. v. Coastal Indus. Servs., LLC*, No. 1:13-CV-375, (E.D. Tex. Feb. 2, 2016 (doc. #49)). At this stage, the undersigned's ruling herein does not foreclose the use of a test group in this case for *trial purposes* at a later date in the interest of judicial economy. However, there is a significant difference between limiting trial parameters and limiting discovery. As discussed herein, evidence need not be admissible to be subject to discovery under the Rules. Furthermore, in order to determine the proper representative plaintiffs for a test group or bellwether trial, the parties should be able to conduct discovery first to obtain information and evidence used in determining the representative plaintiffs who should proceed to trial first. The plaintiffs have not cited any persuasive case law supporting limiting the number of plaintiffs who should be subject to discovery, especially when those plaintiffs have filed their claims individually and not collectively. The Eastern District of Texas cases mentioned by plaintiffs in support of representative discovery are distinguishable because both were collective FLSA actions and involved significantly larger numbers of plaintiffs. *See Nelson v. Am. Standard Inc.,* No. 2:07-cv-10; 2:08-cv-390, 2009 WL 4730166 (E.D. Tex. Dec. 4, 2009) (Everingham, J.) (involved a request for conditional certification and over 1,300 plaintiffs); *Schiff v. Racetrac Petroleum, Inc.*, No. 2:03-CV-402 (E.D. Tex. June 8, 2005, doc. #111) (Ward, J.) (unpublished and unreported; involved 1,000 "opt-in" plaintiffs);

Plaintiffs have not carried their burden by establishing that they are entitled to protection from discovery. Granted, deposing and obtaining discovery from the large number of plaintiffs may certainly be burdensome, but by filing their claims individually against their employer, they have subjected themselves to discovery under the applicable rules and case law cited herein. Plaintiffs cannot expect to bring claims to trial without giving defendant the opportunity to conduct discovery on those plaintiffs. For these reasons, the plaintiffs' arguments for limited discovery in this case to a sample or test group is overruled and the related motion for protection must be denied. The Court accordingly finds it appropriate to allow ISC to conduct discovery on *all* plaintiffs, despite the plaintiffs' objections to the contrary.

In support, the undersigned notes that the Court has the inherent power to manage and control its own docket in order to achieve the orderly and expeditious disposition of cases. *See Cranford v. Morgan Southern, Inc.*, 421 F. App'x 354, 357 (5th Cir. April 5, 2011) (citing *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005)). "A district court has broad discretion in all discovery matters, and such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." *See Moore v. CITGO*, 735 F.3d at 315 (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000)); *see also Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir.1991) ("This Court has broad discretion over the discovery process)).

B. Defendant's Motion to Compel Discovery Responses

Federal Rule of Civil Procedure 37(a) governs motions to compel discovery responses. Rule 37(a)(3)(B) provides that a party seeking discovery may move for an order compelling production against another party when the latter has failed to produce documents requested under Federal Rule of Civil Procedure 34 or to answer an interrogatory under Federal Rule of Civil Procedure 33. *See*

FED. R. CIV. P. 37(a)(3)(B)(iii)-(iv). *Nguyen v. Versacom, LLC,* No. 3:13-CV-4689-D, 2015 WL 8316436, at *4 (N.D. Tex. Dec. 9, 2015). For purposes of Rule 37(a), "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." FED. R. CIV. P. 37(a)(4).

The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable. *Id.* Citing *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). And a party who has objected to a discovery request must, in response to a motion to compel, urge and argue in support of his objection to a request, and, if he does not, he waives the objection. *Id.* (Citing *Sonninov. Univ. of Kansas Hosp. Auth.*, 221 F.R.D. 661, 670-71 (D. Kan. 2004)). A party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *Id.* Citing *Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005); *see also S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) ("A party asserting undue burden typically must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.").

The party seeking discovery, to prevail on a motion to compel or resist a motion for protective order, may well need to make its own showing of many or all of the proportionality factors under Rule 26. *Nguyen,* at *5.. The recent amendments to Rule 26(b) and Rule 26(c)(1) also do not alter the basic allocation of the burden on the party resisting discovery to – in order to prevail on a motion for protective order or successfully resist a motion to compel – specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable. *Id.* (citing *McLeod*, 894 F.2d at 1485; *Heller v. City of Dallas*, 303 F.R.D. 466, 483-93 (N.D. Tex. 2014)).

Turning to the discovery requests at issue here, plaintiffs' objections can be generally categorized as follows: (1) objections on the basis that ISC's requests are broad,"vague and ambiguous" or overly burdensome; (2) objections that ISC is in a better position to respond to the request based on payroll and personnel records and information equally available to ti; and (3) objections to requests seeking admissions or responses concerning a matter of law. *See Plaintiffs' Objections and Responses to Request for Admissions, Objections and Responses to ISC's First Interrogatories, and Objections and Responses to Requests for Production, Exhibit F to ISC's Motion to Compel* (doc. #44-6).

i. *"Overly Burdensome, Vague or Ambiguous"*

As for the first category of objections, the Court has reviewed ISC's discovery request in light of this category of objections and finds those requests to be permissible under the broad scope of discovery allowed by Rule 26(b)(1). The plaintiffs' objections are not specific as to why ISC's requests are outside of the scope of "relevance." It is their burden to make this showing as the parties resisting discovery. In their response to ISC's motion they contend that ISC has not shown that the benefits of allowing the sought discovery outweighs the burden and costs to plaintiffs. However, a closer reading of ISC"s requests show that they are specific to the issues at hand. For example, ISC seeks the identity of all present or former ISC employees with whom plaintiffs have had contact (Interrogatory No. 2), all ISC managers or supervisors present at the alleged pre-shift mandatory safety meetings at issue (Interrogatory No. 7), plaintiffs who were assigned radio equipment they were required to retrieve pre-shift or post-shift (Interrogatory No. 8), and witnesses to the plaintiffs' performance of alleged compensable activities (Interrogatory No. 10). A review of ISC's discovery requests reveals they are tailored to information relevant to the claims and defenses at issue and the plaintiffs have not established how they will be unduly burdened in responding to these fairly specific and straightforward requests. Even the broader requests - *e.g.*, Interrogatory No. 2, which requests the identity of all present or former ISC employees with whom plaintiffs have had contact - are sufficiently limited to the claims at issue and relevant to the case by stating "regarding any matter in any way pertaining to the allegations contained in your Complaint." *See Exhibit F to ISCs Motion*, at p. 5. Having brought suit, each individual plaintiff should have the responsive information within their knowledge or possession. The general and boilerplate objections of "overbroad" and "unduly burdensome" are prohibited where, as is the case here, the party asserting the objection does not explain the grounds for the objection with the requisite specificity. *See Heller*, at 483 (internal citations omitted). This category of plaintiffs' discovery objections should be overruled and their answers be compelled to the extent plaintiffs were non-responsive on this basis.

ii. *Objections Based on ISC's Equal Access to or Knowledge of Information Sought*

Plaintiffs also objected to many of ISC's discovery requests on the basis that defendant is "in a better position" to answer the request or because the sought information is more easily accessible to ISC. Plaintiffs offer no legal support for the premise that they should not be required to respond simply because the requesting defendant may already have access to the evidence. *See Plaintiffs' Response* (doc. #46), at pp. 2-4. As noted by defendant in its motion and corroborated by the Court's own legal research, there are no cases to be found within the Fifth Circuit which support the principle that a party may object to and be excused from responding to an otherwise valid discovery request simply because the requesting party may be "in a better position to respond" or has the information within its own possession. In fact, the cases the Court found on the issue hold the opposite: an objection based on the ground that the discovery request seeks information or documents equally available to the propounding party is insufficient to resist a discovery request. *See Alcorn v. Bright*, No. 14-CV-01927, 2015 WL 555986, at *1 (N.D. Cal. Sept. 18, 2015) (citing *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000)); *see also Charter Practices Int'l, LLC v. Robb,* No. 3:12cv1768, 2014 WL 273855, at *2 (D. Conn. Jan. 23, 2014) (collecting citations); *Hill v. Asset Acceptance*, No. 13CV178, 2014 WL 3014945, at *7 (S.D. Cal. July 3, 2014); *Nat'l Academy of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 682 (C.D. Cal. 2009); *Bretana v. Int'l Collection Corp.*, No. C07-05934 JF (HRL), 2008 WL 4334710, at *5 (N.D.Cal. Sept. 22, 2008). Plaintiffs' objections on this issue are without merit and overruled. To the extent they have withheld discovery responses on this basis, they are compelled to respond as the "equally available" or "in defendant's possession" objection is clearly unsupported under the law.

iii. *Objections Based on Requests Requiring "Legal Analysis"*

Finally, plaintiffs have objected to a number of ISC's discovery request on the basis that they concern "a matter of law" or require plaintiffs to perform legal analysis or review legal instruments. The rules governing discovery specifically guard against this category of objection. *See* FED. R. CIV. P. 33(a)(2) ("[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]"); *see also* FED. R. CIV. P. 36(a) (scope of requests for admission may include matters relating to " the application of law to fact, or opinions about either. . ."). Furthermore, a review of ISC's requests to which plaintiffs objected in this regard reveals that they do not seek legal conclusions or legal analysis by the plaintiffs. *See, e.g.*, ISC's Interrogatory No. 2 (seeking identity of ISC employees with whom plaintiff has had contact); Interrogatory No. 3 (request to identify compensable activities); Interrogatory No. 4 (identify supervisors or managers requiring performance of allegedly compensable pre-shift or post-shift work). ISC's requests seek plaintiffs' contentions regarding the factual basis for their claims. These type of "contention interrogatories" are specifically permitted under Rule 33 and serve to discover the theory of the responding party's case by setting forth the facts on which the party bases its contentions. *See Nimkoff v. Dollhausen*, 262 F.R.D. 191, 195 (E.D.N.Y. 2009). Sister district courts within the Fifth Circuit have likewise held that contention interrogatories may properly ask for "the *facts that support an allegation or defense* as well as the identities of knowledgeable persons and *supporting documents* for the facts supporting an allegation or defense." *Innovative Commc'n Sys., Inc. v. Innovative Computing Sys., Inc.*, No. A-13-CV-1044-LY, 2014 WL 3535716, at *2-*3 (W.D. Tex. July 16, 2014) (quoting *Malibu Consulting Corp. v. Funair Corp.,* No. SA–06–CA–0735, 2007 WL 3995913, at *1 n.1 (W.D. Tex. Nov.14, 2007)) (emphasis in original). "Contention interrogatories include questions asking an opposing party to state all the facts upon which it bases some specified contention and questions asking an opponent to state all the evidence on which it bases some specified contention." *Id.*

Plaintiffs' objections that they have been improperly asked to perform "legal analysis"are therefore misplaced. Finally, it only follows from a common sense standpoint that plaintiffs can certainly answer these types of requests sufficiently without having to set forth impermissible legal conclusions.

C. Conclusion and Order of the Court

Based upon the findings and legal conclusions stated herein, the Court **ORDERS** that plaintiffs' *Motion for Protection from Discovery* (doc. #36) is **DENIED** and the defendant's *Motion & Incorporated Memorandum to Compel Plaintiffs' Discovery Responses* (doc. #44) is **GRANTED**. Plaintiffs' objections to ISC's discovery requests are overruled and plaintiffs are **ORDERED** to fully respond to ISC's requests to the extent they have not done so already.

However, in light of the Court's recent extension of the discovery and dispositive motion deadlines and the order directing the parties to participate in mediation, the Court finds it most efficient and in the interest of judicial economy to allow plaintiffs time after mediation to serve their discovery responses on ISC. This guards against unnecessary expenses and time spent preparing and reviewing those discovery responses by all parties should mediation result in a resolution of the plaintiffs' claims. The Court therefore **ORDERS** that plaintiffs are directed to comply with this Court's ruling on the motion to compel by providing sufficient discovery responses within **thirty (30) days after the date of the mediation** to be scheduled by United States Magistrate Judge Zack Hawthorn (should that mediation result in impasse). Given the May 15, 2016, mediation deadline, this 30 day limitation will still allow the parties ample time to complete discovery prior to the October 3, 2016, discovery deadline if they are unable to reach a settlement.

SIGNED this the 9th day of March, 2016.

KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE